IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

APPEAL NO.1103 OF 1998

IN

SUIT NO.1783 OF 1981

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1. Manohar Verhomal Dudani
2. Shanshyam Verhomal Dudani
3. Dr.Pushpa Verhomal Dudani ...Appellants
(orig.Defendants)

v/s.

1. Lilaram K. Kukreja
2. Ashok Lilaram Kukreja ...Respondents
(orig.Plaintiffs)

...

Mr.D.H. Mehta i/b Pratap Singh & S.S.Gawade for the Appellants.

Mr.A.Y.Sakhare with Mr.R.A.Thorat i/b D.S.Parikh & Ms.V.V.Thorat for the Respondents.

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CORAM: D.K.DESHMUKH &
J.H.BHATIA, JJ.
DATED: 31ST JULY, 2007

P.C.:

1. By this Appeal, the Appellants challenge the order passed by the learned single Judge dated 29th August, 1998 in Suit No.1103 of 1998. By that judgment the court has decreed the suit filed by the Respondents for specific performance of the agreement to sell the flat.

2. The facts that are relevant and material for deciding this Appeal are that the Respondents/original Plaintiffs filed a suit for a decree of specific performance of an agreement between the Plaintiffs and the Defendants to sell Flat No.303, in Kedarnath Building, Plot No.20, 3rd

floor, 3rd Road, Khar (West), Mumbai-52 and part of Flat No.304 from the said Building. The suit property is admittedly owned by the Appellants, who were Defendants in the suit. The agreement of which specific performance was sought is dated 18th March, 1981. The Defendants agreed to sell the flats to the Plaintiffs for a consideration of Rs.3,50,000/-. As earnest money an amount of Rs.35,000/- was given. It was agreed that the balance price would be paid at the time of execution of the sale-deed and that the sale-deed would be executed on or before 30-6-1981. It was also declared that the time is essence of the contract. It appears that on 6-6-1981 the Plaintiffs addressed a communication to the Defendants requesting the Defendants to fix the date for execution of the sale-deed. There was no response to the communication. Therefore, a telegram was sent. There were other communications also addressed by the Plaintiffs to the Defendants. The reply ultimately came in the form of letter dated 9th July, 1981 stating that the agreement has already been terminated. There was some correspondence between parties thereafter. Ultimately, a civil suit was filed. In the civil suit a decree of specific performance of the contract was sought. The

Defendants filed their written statement. The principal defence of the Defendants was that they had agreed to sell the suit flats to the Plaintiff, because they wanted to purchase some other properties. According to them they wanted to purchase some other property, therefore they thought of disposing of the suit flat as they wanted to utilise the sale proceeds of the suit flat towards the purchase of the other property, and as the Plaintiffs did not pay that amount immediately, the agreement for sale was terminated. According to the Appellants, therefore, there is no agreement in force between the parties because it is already terminated.

3. The parties filed documents. The parties also led oral evidence. On behalf of the Plaintiffs, the Plaintiff No.3 Dr.Pushpa Dudani was examined as a witness and on behalf of the Defendants, Defendant No.2 Mr.Ashok Kukreja was examined as a witness. The court decided the suit by its judgment dated 29th August, 1998. The court decreed the suit for specific performance in favour of the Plaintiffs. On the basis of the rival pleadings, the learned single Judge has framed following issues:

1. Whether the Plaintiffs prove that they are entitled to specific performance of the agreement dated 18-3-1981 Exh.B to the Plaint?

2. Whether the Plaintiffs prove that they were ready and willing to perform their part of the contract as per agreement dated 18-3-1981?

3. Do the Plaintiffs prove that in the alternative they are entitled to damages, as prayed for?

4. Do defendants prove that the father of Plaintiffs had terminated the agreement dated 18-3-1981 as stated in para 15 of the written statement?

5. Whether the agreement dated 18th March 1981 is a concluded one or not?

6. Whether the Plaintiffs prove that the signature on Ex.B agreement dated 18-3-1981 is that of Plaintiff No.3?

7. Whether the defendants prove that the Plaintiffs have not paid proper court fees, if so what order?

8. What order and decree?

4. The learned Judge by his judgment held that the agreement between the parties is in existence and is valid. The learned single Judge has also held that the Plaintiffs were ready and willing to perform their part of the contract. The learned Judge found that the defences that were raised in the written statement have been given up by the Defendants while leading oral evidence.

5. The learned Counsel appearing for the Appellants firstly submits that the agreement was signed only by Defendant No.1, and therefore, the agreement was not binding on Defendant No.2. Defendant No.2 is the owner of the flat No.304 which is one of the suit flats and therefore the learned single Judge committed an error in passing a decree of specific performance. The second submission advanced by the learned counsel is that the agreement was not signed by all the Plaintiffs, but was signed only by

Plaintiff No.3 and therefore the learned single Judge was not justified in passing a decree of specific performance in favour of the Plaintiffs. The next submission made by the learned Counsel for the Appellants is that the Plaintiffs have not proved that they are ready and willing to perform their part of the contract. The learned single Judge has committed an error in recording a finding in that regard in favour of the Plaintiffs. The last submission is that, considering the passage of time and considering the price which was agreed to be paid, the learned single Judge was not justified in passing a decree of specific performance in favour of the Plaintiffs.

6. We have also heard the learned Counsel appearing for the Respondents.

7. So far as the first submission is concerned, perusal of the judgment of the learned single Judge shows that the learned single Judge has rejected that contention by relying on the deposition of the Defendant No.2 himself. In his examination-in-chief, the Defendant No.2 has clearly stated that he and Defendant No.1 agreed to sell the premises to the

Plaintiffs. In his cross-examination, he has also stated that the Defendant No.1, his father, signed the agreement for himself and also on behalf of the Defendant No.2. What is further pertinent to be noted is that only witness examined on behalf the Defendants was Defendant No.2. In our opinion, no exception can be taken to the finding recorded by the learned single Judge that the agreement was signed by Defendant No.1 for both the Defendants.

8. So far as second submission is concerned, perusal of the agreement shows that the agreement clearly mentions that it is an agreement between two Defendants and three Plaintiffs. According to deposition of the Defendant No.2 that agreement has been signed by Defendant No.1 for himself and on behalf of the Defendant No.2. In our opinion, that the agreement is not signed by all the Plaintiff and is signed by only one of the Plaintiffs, is not material, and for that reason only the court will not be justified in denying a decree of specific performance in favour of the Plaintiffs.

9. So far as third submission is concerned, it is clear that in the plaint there is a clear averment

made that the Plaintiffs were always ready and willing to perform their part of the contract. They relied on the correspondence and letters written by them to the Defendants to fix the date for execution of the sale deed so that they can make payment of the balance amount to the Defendants. Perusal of the written statement filed by the Defendants shows that the Defendants merely denied that the Plaintiffs are ready and willing to perform their part of the contract. They no where stated that the Plaintiffs did not have enough funds to perform their part of the contract. Perusal of the judgment of the learned single Judge shows that the learned single Judge has considered the entire evidence on record on this point and has recorded a finding in favour of the Plaintiffs. Nothing was to be found from the material on record which will justify our interference with the findings recorded by the learned single Judge.

10. So far as last submission is concerned, it is true that the prices of the properties in the year 1981 were less. It is also true that now the prices of the properties have gone up. The learned single Judge has exercised his discretion and has made a

decree of specific performance of a contract. In our opinion, merely because of passage of time we will not be justified in interfering with the discretion exercised by the learned single Judge. The learned Counsel appearing for the Appellants relied on a judgment of the Supreme Court in the case of Pushparani S.Sundaram and ors. v/s. Pauline Manomani James (deceased) & ors., (2002) 9 SCC 582 in support of his submission that the decree for specific performance could not be passed in favour of the Plaintiffs. But perusal of that case shows that nothing said in that case is relevant for the purpose of deciding this Appeal. In that case all the courts have found that the Plaintiff is not entitled to the decree of specific performance, because the Plaintiff has not produced any material on record to show that he was ready and willing to perform his part of the contract. In our view , there is no reason to interfere with the judgment impugned in the Appeal. As we find that the grievance made by the Appellants that the prices of the properties have gone up, we inquired from the learned Counsel appearing for the Respondents/Plaintiffs whether the Plaintiffs are willing to pay additional amount to the Defendants. The learned Counsel for the Plaintiffs, after taking

instructions, stated before us that without prejudice to their rights and contentions, the Plaintiffs are willing to offer an amount of Rs.15,00,000/- (Rupees Fifteen Lakh only) to the Defendants. The learned Counsel appearing for the Defendants, after taking instructions, however,stated that the Defendants are not ready to accept the amount. Still, in our opinion, following order would meet the ends of justice.

O R D E R

(i) Appeal is dismissed. Interim order granted by the court which was operating during the pendency of the Appeal is vacated.

(ii) It is directed that the Respondents/Plaintiffs shall deposit the balance amount of consideration under the agreement + the amount of Rs.15,00,000/-, which they have offered, in this court, with due intimation to the Defendants.

(iii) On the amount being deposited, in terms of the decree passed by the learned single Judge, the sale

deed shall be executed in favour of the Plaintiffs.

(D.K.DESHMUKH, J.)

(J.H.BHATIA, J.)

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